No. 78-744

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES TIMMRECK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-744

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES TIMMRECK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

1. Respondent does not dispute that the courts of appeals have disagreed over the proper resolution of the issue presented in this case or that that issue is of substantial practical importance. Rather, he claims only that "[t]he factual record in this case is inadequate to provide this Court with an appropriate case for resolving the conflicts among the circuits" (Br. in Opp. 7). Contrary to this contention, however, the district court conducted a hearing on respondent's motion to vacate sentence pursuant to 28 U.S.C. 2255 and expressly found that respondent's guilty plea was voluntary, that he received the bargained-for term of imprisonment, and that he was not prejudiced by the court's failure to inform him of the maximum special parole term at the time of the plea (H. 16; Pet. App. 18a, 22a & n. 3). The court of appeals did not disturb these findings. Hence, there is no need for additional factual development before this Court may resolve the legal issue presented.

2. Subsequent to the filing of the petition in this case, the United States Court of Appeals for the Fifth Circuit concluded, contrary to the ruling of the court below, that noncompliance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure does not automatically entitle a defendant to collateral relief from his guilty plea. In *Keel* v. *United States,* No. 77-2019 (Nov. 30, 1978), the defendant had been misinformed at the Rule 11 proceeding that he could be sentenced to 45 years', instead of 25 years', imprisonment, but he actually received the 12-year prison sentence for which he had bargained. The district court denied Section 2255 relief, finding that the erroneous information had not prejudiced the defendant or affected the voluntariness of his plea, and the court of appeals affirmed.

The Fifth Circuit, sitting en banc, unanimously "reject[ed] the application of a *per se* rule, which would permit the defendant to withdraw his plea merely because the district court had not literally complied with the requirements of Rule 11, Fed. R. Crim. P." (slip op. 1226). It held, consistent with the government's position in this case, that "when a collateral attack is made on a guilty plea for failure of the district court to literally comply with * * * Rule 11, the defendant must show prejudice in order to qualify for § 2255 relief. In the absence of a fundamental defect which inherently results in the miscarriage of justice, or an omission inconsistent with the demands of fair procedure, relief cannot be given in a collateral attack on a guilty plea conviction based on failure of Rule 11 compliance when the plea was taken" (*id.* at 1226-1227). These principles are controlling here.[1]

---

[1]We are lodging 10 copies of the *Keel* opinion with the Clerk of this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

DOJ-1978-12